No. 13,118

IN THE

United States Court of Appeals

For the Ninth Circuit

EDWARD J. CARRIGAN,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT.

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STATEMENT OF JURISDICTION.

The indictment filed in the United States District Court for the Northern District of California, Southern Division, charged appellant and others with the crime of conspiracy (18 U.S.C., sec. 371) in that district. CT 1-3. The District Court had jurisdiction. 18 U.S.C., sec. 3231; Rule 18, Federal Rules of Criminal Procedure. After conviction appellant was sentenced to imprisonment and fine by final judgment of that court on August 23, 1951. CT 166-167. His notice of appeal to this court was filed August 23, 1951. CT 172. The appeal was timely. Rule 37 (a), Federal Rules of Criminal Procedure. The jurisdiction of this court to review the final judgment of the District Court is sustained by 28 U.S.C., secs. 1291, 1294.

STATEMENT OF THE CASE.

The indictment was filed April 18, 1951 (CT 3), and it charged that "on or about January 27, 1951, and continuously thereafter up to and including the 12th day of April, 1951", the defendants Edward J. Carrigan, Ray Calmes, Sam Neider, and Jack Reynolds conspired together and with Phil Davis and John Church to defraud the United States in the exercise of its governmental functions by unlawfully attempting to influence, obstruct, and impede the Attorney General and the Bureau of Prisons in the designation of the places of confinement and transfer where Phil Davis, a Federal prisoner convicted of violating the Motor Boat Act was to serve his sentence of six months imprisonment. CT 1-2. Appellant was specifically named in two of the five overt acts alleged (CT 2-3) as follows:

> "1. On January 27, 1951, said defendant Edward J. Carrigan met said John Church at the Phil Davis Automobile Agency, 2547 E. 14th St., Oakland, California, and they held a conversation together." CT 1.
>
> "5. On April 12, 1951, on Mission Street between Sixth and Seventh Streets, in the City and County of San Francisco, State of California, about 2:13 o'clock in the afternoon of said day, said defendant Edward J. Carrigan had a conversation with said John Church, and said John Church delivered to the said Edward J. Carrigan the sum of $2000.00 in United States currency, and said Edward J. Carrigan accepted the same." CT 3.

A judgment of acquittal was entered by the court on July 30, 1951. CT 12-13. This appellant and the defendants Calmes and Reynolds were found guilty by the jury on August 4, 1951. CT 151. Appellant's motion for a new trial (CT 152-153) in which he attacked the sufficiency of the evidence and the soundness of the jury instructions was denied August 23, 1951 (CT 162), and by judgment and commitment he was sentenced to imprisonment for 5 years and fined $5000. CT 166-167. His notice of appeal was filed August 23, 1951. CT 172.

The record on appeal is typewritten and contained in 11 volumes. The first volume contains the clerk's transcript. (CT 1-178.) The other ten volumes contain the reporter's transcript. (RT 1-1511A.) In making this statement of the case appellant is mindful that much of the testimony of John Church, an alleged conspirator and the first government witness (RT 19), as to statements allegedly made to him by some of the defendants, came into the record under rulings of the court excluding it from the case against this appellant. And appellant is also mindful that the ruling of the court granting the motion of defendant Neider for judgment of acquittal was accompanied by a further ruling wherein he instructed the jury as follows (RT 741-742):

> "During the course of the case, and particularly in the testimony of the two witnesses John Church and Phil Davis, and during the taking of the testimony of those witnesses, evidence was received that certain declarations were stated to

have been made by the defendant Neider. Since I have ruled that the evidence is insufficient as a matter of law to connect Neider as a member of the alleged conspiracy, I now charge you and instruct you that regardless of whatever ruling I have heretofore made of and concerning such declarations of Neider, such declarations are not evidence against the defendants Reynolds, Carrigan and Calmes or either of them, and you must disregard entirely such declarations in toto in considering the guilt or innocence of Reynolds, Carrigan or Calmes or either or any of them."

During the times referred to in the indictment appellant was the United States Marshal for the Northern District of California. The President appointed him to that office on August 11, 1950. RT 797. He was not connected with the Marshal's office before the appointment and was not experienced in the type of work entailed. John A. Roseen, with 24 years experience, was the Acting United States Marshal when appellant took office, and Roseen became Chief Deputy Marshal under appellant. RT 444-445.

Defendant Calmes was a Deputy United States Marshal when appellant took office. He had had 8 years experience and was a full time deputy handling the work of the office in Alameda County and the east bay area where he resided. RT 491, 961-962. Appellant was not acquainted with Calmes before August 11, 1950. RT 798. Calmes introduced appellant to John Church at the Phil Davis automobile agency in Oakland on January 27, 1951. RT 800, 803, 965-966. Ap-

pellant did not again meet Church or talk with him until April 12, 1951. RT 79, 91, 809, 930-931. Appellant was not acquainted with Phil Davis before taking office. RT 802. He did not see Davis or talk to him afterwards at any time before the trial of this action. RT 250, 809. The same statement is true as to defendant Neider. RT 1044-1045. Before taking office appellant had little acquaintance with and less liking for defendant Reynolds. He met Reynolds at a labor convention in 1948 or 1949 and at a political dinner on April 9, 1950. RT 879-880, 1201-1202. When appellant was campaigning for appointment as United States Marshal, Reynolds opposed his candidacy and supported a rival. RT 882-883, 893-894, 1202-1204. After April 9, 1950, appellant did not again see Reynolds or talk to him until the trial of this action. RT 799, 816, 881, 1277-1278, 1287.

Appellant went to the Phil Davis automobile agency in Oakland on January 27, 1951, pursuant to the suggestion and appointment of defendant Calmes. RT 998. It was preceded by an office conversation wherein appellant had stated his intention to replace his 1947 Pontiac automobile with a 1950 model automobile and Calmes had suggested that the Davis agency, where he bought an automobile in June of 1950 and where it was being serviced, had a number of 1950 Chryslers on hand. RT 963-964, 990, 999-1000, 1035-1037. Church and appellant had a conversation in the presence of other people and consuming less than half an hour at the Davis agency on January 27, 1951. RT 88-90, 809. The testimony is conflicting, however, as to what

was said at that time and place. As Church narrates the conversation appellant wanted to exchange his 1947 Pontiac automobile, valued at $1150 to $1500, for a 1950 Chrysler, priced at $3025, saying in the course of the conversation, "Well, does Mr. Davis expect to make a profit on the deal?" (or "Mr. Davis doesn't expect to make same profit on a 1950 as on a 1951"), I guess Mr. Davis understands that after he is arrested I will have full charge over his custody", "I think Phil Davis ought to make a straight across the board deal, trade car for car", "After all $1500 or $2000 doesn't mean anything to Mr. Davis", and Church saying he would pass it on to Davis. RT 24-27, 88. As appellant narrated the conversation an even trade of automobiles was never mentioned or discussed, but when Church proposed a trade in value for appellant's Pontiac much less than he had been offered elsewhere, appellant pointed out that a new car would lose $750 in value as soon as it was taken out of the shop, called the Davis agency "burglars without guns", and walked out of the agency with Calmes. RT 804-809, 868-869. He bought an automobile elsewhere. RT 869-870.

As of January 27, 1951, Davis was out on bail after having been convicted in the United States District Court, at Sacramento, of the misdemeanor offense of violating the Motor Boat Act, 46 U.S.C., sec. 526. He was sentenced to 6 months imprisonment. This court affirmed the judgment on December 11, 1950. *Davis v. United States,* 9 Cir. 185 F. 2d 938. The Supreme Court denied a petition for certiorari

on February 26, 1951. *Davis v. United States,* 340 U.S. 932, 71 S.Ct. 495. In due course an order to take Davis into custody was issued by the District Court, at Sacramento, and reached the Marshal's office in San Francisco on March 5, 1951. RT 480.

Ordinarily, a Federal misdemeanor prisoner sentenced to 6 months imprisonment is imprisoned in the prison camp at McNeil Island. RT 461-462, 733. Discretion to authorize imprisonment in a local jail in such cases is vested exclusively in the Director of Prisons in Washington. RT 463, 476-477, 514, 717-718, 733. Requests for such authorization are frequent and very often informal. RT 731-733. Family and business ties of the prisoner are important elements prompting the granting of such requests. RT 732. When authorization for imprisonment in a local jail is granted by the Director of Prisons, a United States Marshal has some latitude in designating the local jail. RT 476. The Alameda County jail is an accredited local jail for the imprisonment of Federal misdemeanor prisoners. RT 464, 716, 950-951. And in normal course a Federal prisoner committed to the Alameda County jail would be placed by the Sheriff of that county in the branch of the jail at Santa Rita. RT 660. The Bureau of Prisons has rules and regulations governing the custody of Federal prisoners and, among other things, such prisoners are protected from photographing and interviewing by the press. RT 481-482. It is against these rules and regulations to accord a Federal prisoner special privileges while in a local jail. RT 712-713. Such prisoner is subject to

the prison routine established by the Sheriff or other local authority, not by a United States Marshal. The Sheriff of Alameda County does not accord special privileges to a Federal prisoner confined in an Alameda County jail. RT 654-655.

Authorization from the Director of Prisons for confinement of Davis in a local jail had been obtained by the attorney representing Davis in the trial court as early as November of 1949, and the Director of Prisons, under date of November 29, 1949, had sent a telegram to John A. Roseen, then Acting United States Marshal, San Francisco, wherein he stated, "Have no objection if you and U. S. Attorney think commitment jail rather than McNeil Camp would be proper. If you agree please notify Attorney Sullivan." RT 446-447. Appellant had no knowledge of the existence of this telegram until it was shown to him by Mr. Roseen on March 5, 1951, and at the suggestion of Mr. Roseen appellant immediately obtained from the United States Attorney the consent required by the telegram before Davis could be committed to a local jail. RT 490-491, 810-816.

Davis had changed attorneys after he was convicted, and between February 26 and March 5, 1951, the attorneys who represented Davis on the appeal to this court and on the certiorari petition to the Supreme Court communicated with appellant and his office respecting the surrender and place of confinement of Davis, suggesting a time and place for such surrender that would avoid publicity and inquiring if he could be confined in a local jail. RT 812-813,

1114-1115. And on March 7, 1951, these same attorneys again communicated with appellant, after he was aware of the telegram of November 29, 1949 and had obtained the consent of the United States Attorney, and arranged a time and place for the surrender of Davis in Alameda County. RT 817, 1104-1107. At the time and place thus arranged Davis surrendered in Alameda County where he and his family lived and where his business was located, and he was taken to the Santa Rita branch of the Alameda County jail by Deputy United States Marshal Calmes. RT 819-821, 970-972.

The facts in the Davis case were before this court in *Davis v. United States,* 9 Cir. 185 F. 2d 938. It would be irrelevant to review or repeat them here. The case evoked a great deal of publicity, much public sympathy and sentiment for the injured child, and much public antipathy and resentment against Davis. This persisted after Davis was committed to the Santa Rita jail on March 7, 1951, and rumors reflecting on the Marshal's office began reaching appellant. RT 824, 908.

Appellant left for the east at 8:40 a.m. of March 19, 1951, to take a prisoner to Philadelphia, and he had in mind a routine call on the Director of Prisons and a discussion of the Davis case with him. RT 495-496, 825-826. He made that call in Washington on March 21, 1951. RT 709, 899. The Director of Prisons, James V. Bennett, was a witness for the government at the trial of this action (RT 696) and his recollection of what was said at that time differs from

appellant's recollection. Bennett's recollection was that appellant did not mention Davis' name, that as appellant was leaving he said he was "having a little trouble with one of the men out in the Oakland jail" —"something out of the ordinary"—who was asking "for some special privileges", that Bennett told appellant to "remove the man immediately"—"you can transfer him to McNeil Island or any other approved jail", and that appellant replied, "Leave it to me, I will take care of it". RT 709-713. Appellant's recollection of the conversation of March 21, 1951, was that he mentioned Davis' name to Bennett, told him of the rumors reflecting on the Marshal's office, and Bennett said, "Protect yourself, protect your office" —"transfer the man to McNeil Island or any other approved institution or jail". RT 829-830, 900-901.

Appellant returned to San Francisco from the east on March 22, 1951. RT 495-496. And defendant Calmes left for Honolulu on March 24, 1951, and did not return to San Francisco until April 4, 1951. RT 973. The record has it that on March 26, 1951, defendant Reynolds was told by Church that if any attempt was made to move Davis from Santa Rita to another jail the FBI would be called in. RT 50-51. And the record further has it that on March 26, 1951, the FBI was in fact called in by Davis and Church and attorneys then representing them. RT 170.

On March 30, 1951, appellant had an office conversation with his deputy James Egan in which he told Egan to telephone the Santa Rita jail (or the office of the Alameda County Sheriff) and tell them

Davis was being moved to McNeil Island as soon as another trip was ready for McNeil and for them to inform Davis that if he had any business to transact he had better do it soon. RT 516-519, 529-530. Egan telephoned as instructed. RT 517-519. This conversation in the Marshal's office occurred in the presence of Martin Lightbody, a special agent of the FBI. RT 529-530. Appellant knew at the time that Lightbody was a special agent of the FBI. RT 533, 835. And Lightbody knew at the time that the FBI was investigating the Davis case. RT 532. When Lightbody returned to the FBI office he reported the occurrence to his superior, made notes of what had occurred, and from the notes dictated a memorandum of the occurrences. RT 535-536. The conversation of March 30, 1951, was also confirmed by the testimony of appellant who added that he had instructed Egan to ask the Sheriff's office how long a notice it would require in order to get Davis ready. RT 834-836, 905-906.

No order to transfer Davis to McNeil Island was ever issued. RT 906.

Mention has already been made of the fact that defendant Calmes left for Honolulu on March 24, 1951, and did not return to San Francisco until April 4, 1951. RT 923. Church, who since March 26, 1951, was acting under the direction and supervision of the FBI, telephoned Calmes at his place of business in Oakland on April 5, 1951, and a conversation was had respecting Davis. RT 56-58. The court ruled that Church's testimony as to the contents of the

conversation was "received solely against the defendant Calmes". RT 57/16-17. The court later instructed the jury that "Sometimes evidence is limited to a certain purpose or to a certain defendant. When received and so limited you may consider it as it relates to the purpose or defendant to which or to whom it was limited. You may not otherwise consider it." RT 1494/3-7. Church also testified as to Church-Calmes conversations occurring on April 6, 1951 (RT 58-60), April 9, 1951 (RT 60-62), April 10, 1951 (RT 62-65), April 11, 1951 (RT 65-67), and April 12, 1951 (RT 67-68), some over the telephone and some at the Davis automobile agency. Under rulings of the court such testimony was also received solely against the defendant Calmes. RT 58/17-20, RT 60/17-19. These rulings make it unnecessary to burden this statement of the case with a summary of the Church-Calmes conversation.

There was no conversation at any time between Davis and appellant. There was, however, a conversation between Davis and Calmes at Santa Rita on April 10, 1951, and no ruling of the court limited the testimony of Davis respecting it to the case against Calmes. On that occasion defendant Calmes had with him an order for the transfer of Davis from Santa Rita to the Solano County jail (Fairfield). This was prepared at the suggestion of Chief Deputy Roseen after appellant had informed him of reports that Davis was having trouble at Santa Rita. RT 472-473. Davis narrates the Davis-Calmes conversation at Santa Rita on April 10, 1951, as follows (RT

248-249): "Mr. Calmes told me that Marshal Carrigan was very angry and that I was being moved to Fairfield. I asked him what Mr. Carrigan was angry about, and he said, well, there has been a lot of lies going around town, and they had found out that I had been paying money to various people, people who couldn't do me any good, and that Mr. Carrigan thought that inasmuch as I was tossing money around, they should have some of it, and they, the people who could do me some good, should have some of it, and he would like Mr. Calmes to have $500 for himself", "And Mr. Calmes said I could give him the $500 if I wished, or if I didn't we would still be friends, and that Mr. Carrigan would expect a new car for his old car after I got out, and that he now had a '50 Lincoln, I said I wasn't interested in any deals after I got out. I was more interested in staying in Santa Rita and not being thrown into some dangerous place than anything else. And I said, 'Just what are the demands that I will have to meet in order not to be molested any more and just live here?' " "He replied he didn't know. He would have to get in touch with Mr. Carrigan", "He would go out and phone Mr. Carrigan and leave me there", "I told him that I didn't wish to be moved", "He told me he had orders to move me to Fairfield".

The Davis-Calmes conversation of April 10, 1951, as narrated by Calmes, was more elaborate and differs from the Davis version in many respects. RT 983-986. Calmes immediately telephoned appellant, as promised Davis, saying that Davis was now satisfied,

that everything had been straightened out, he was being treated fine, and he wanted to stay at Santa Rita. RT 987. Appellant conferred with Chief Deputy Roseen the following morning and the order for the transfer of Davis was recalled. RT 474-475, 873-874.

The Davis-Calmes conversation in the afternoon of April 10, 1951, was preceded by two Calmes-Carrigan office conversations, one on April 9, 1951, and the other in the morning of April 10, 1951. At the conversation of April 9, 1951, and in answer to an inquiry by Calmes as to why Davis was being moved, appellant told Calmes he was tired of hearing rumors that Davis was paying money to be kept at Santa Rita, and instructed Calmes to find out about it and stop such rumors. RT 975-976, 1007-1008. At the conversation in the morning of April 10, 1951, Calmes told appellant that Church had informed him Davis was paying $200 a month for special privileges at Santa Rita. Appellant determined upon a course of action. This consisted in having Calmes obtain from Davis a proposal to pay $2000 directly to appellant. RT 838-841, 844-848, 978-981, 987-988, 1007-1008. Appellant disavowed any purpose of extorting money from Davis or accepting a bribe. RT 845, 865. His avowed purpose was "To bring out into the open some one, unknown, or one or more unknown people who apparently were putting pressure on either Davis or Church or both, with the direct threats of doing something to Davis". RT 849, 866. Calmes acted under the direction and supervision of appellant in

arranging with Church for the payment of this $2000 by Davis. RT 877.

There were two conversations on April 12, 1951, between Church and appellant. The first conversation was over the telephone around 11:30 a.m., and as Church states it appellant was told the money was ready and after suggestions and countersuggestions a meeting was arranged for 2 p.m. on Mission Street between Sixth and Seventh Streets in San Francisco. RT 68. This does not differ substantially from the conversation as stated by appellant. RT 850-852. The second Church-Carrigan conversation on April 12, 1951, occurred at the time and place thus arranged. Church testified he walked up to appellant and spoke to him and said "the money is ready for you", and after appellant had berated Church and Davis "on the manner in which we handled things", Church reached into his pocket and handed appellant the money, ran across the street to his parked automobile, and from that position saw the FBI agents about to arrest appellant. RT 72-73. Appellant testified the conversation was more extensive, and that although repeatedly asked Church refused to name the person or persons supposed to have been putting pressure on Davis in the name of appellant, and that he accepted the envelope handed him by Church and was on his way with it to the United States Attorney's office when arrested by FBI agents. RT 855-860.

SPECIFICATION OF ERRORS RELIED UPON.

1. The District Court erred in denying appellant's motion for judgment of acquittal.

2. The District Court erred in instructing the jury as follows:

> "Although, as I have stated, a common design is the essence of the charge, such design may be made to appear when the defendants steadily pursue the same object, whether acting separately or together by common or different means, all leading to the same unlawful result." RT 1484/18-22.

> "Mr. Burns: The only objection, if Your Honor please, for the record is in instruction No. 13 where Your Honor said, 'Although, as I have stated, a common design is the essence of the charge, such design may be made to appear when the defendants steadily pursue the same object, whether acting separately or together.' It is my understanding of the law that there was to be concerted action in a conspiracy, and as I have indicated before there could be co-existent two separate conspiracies." RT 1499/22 to 1500/5.

3. The District Court erred in denying appellant's motion for a new trial.

ARGUMENT.

1. SUMMARY OF ARGUMENT.

The general conspiracy alleged in the indictment was not proved. There was no substantial evidence proving: (a) A continuing conspiracy from on or about January 27, 1951, up to and including April 12, 1951; (b) a conspiracy existing on or before January 27, 1951; (c) a conspiracy to which the appellant was party on or before March 26, 1951; (d) a conspiracy to which any of those named in the indictment as conspirators, other than Davis and Church and defendant Calmes and this appellant, were party after March 26, 1951.

Appellant's conviction of the general conspiracy cannot be sustained by evidence proving different and disconnected smaller conspiracies. Variance between indictment and proof would be fatal error as to appellant under the circumstances of the case.

Erroneous instructions on material issues operated to the substantial prejudice of appellant.

Denial of appellant's motion for a new trial was a manifest abuse of the discretion confided in the District Court.

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2. THE JUDGMENT AGAINST APPELLANT IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND SHOULD THEREFORE BE REVERSED.

Specification of Error No. 1. The District Court erred in denying appellant's motion for judgment of acquittal.

Specification of Error No. 2. The District Court erred in denying appellant's motion for a new trial.

The indictment alleged that "on or about January 27th, 1951, and continuously thereafter up to and including the 12th day of April, 1951, the above named defendants, Edward J. Carrigan, Ray Calmes, Jack Reynolds, and Sam Neider, did, in the Northern District of California, Southern Division, conspire together, and with Phil Davis and John Church, with the intent and purpose to defraud the United States in the exercise of its governmental powers by impairing, obstructing and interfering with the lawful functions of a Department of the United States, to wit, the Department of Justice, the Bureau of Prisons thereof, and the Attorney General in attempting unlawfully and corruptly to influence, obstruct and impede said Attorney General and said Bureau in the designation of places of confinement where sentence shall be served and transfers made from one institution to another in connection therewith of a Federal prisoner theretofore committed to the custody of said Attorney General, said Federal prisoner being one Phil Davis".

The basis of this indictment was 18 U.S.C., sec. 371, which provided in pertinent part:

> "If two or more persons conspire . . . to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not

more than $10,000 or imprisoned not more than five years, or both."

With reference to continuing conspiracies the Supreme Court said in *Fiswick v. United States,* 329 U.S. 211, 216, 67 S.Ct. 224, 227, 91 L.Ed. 196:

> "Though the result of a conspiracy may be continuing, the conspiracy does not thereby become a continuing one. See United States v. Irvine, 98 U.S. 450, 25 L.Ed. 193. Continuity of action to produce the unlawful result, or as stated in United States v. Kissel, 218 U.S. 601, 607, 31 S.Ct. 124, 126, 54 L.Ed. 1168, 'continuous cooperation of the conspiracy to keep it up' is necessary. A conspiracy is a partnership in crime. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 253, 60 S.Ct. 811, 858, 84 L.Ed. 1129."

And in the present action the court instructed the jury as follows (RT 1485/11-23):

> "In order to warrant you in finding a verdict of guilty against the defendants, or any of them, it is necessary that you be satisfied beyond a reasonable doubt that a conspiracy as charged in the indictment was entered into between two or more of the defendants to violate the law of the United States in the manner described in the indictment. It is necessary further that in addition to the showing of the unlawful conspiracy or agreement, the Government prove to your satisfaction beyond a reasonable doubt, that one or more of the overt acts described in the indictment was done by one or more of the defendants or at their direction or with their aid, and that

such overt act or acts was in furtherance of the object of the conspiracy."

For proof of the general conspiracy alleged in the indictment, that is, the continuing conspiracy from on or about January 27, 1951, up to and including April 12, 1951, the government relied upon the episode of January 27, 1951, as marking the inception and existence of the conspiracy. The conversation between Church and appellant at the Davis automobile agency on that date was alleged in the indictment as the first overt act. CT 2. As Church related that conversation, appellant attempted to make an even trade of an old automobile for an automobile of a later model and greater value, accompanying the attempt with the cryptic statement, "I guess Mr. Davis understands that after he is arrested I will have full charge of his custody" (RT 26). When the conversation occurred Davis was a potential Federal prisoner, being then out on bail after conviction of a Federal misdemeanor offense and his petition for certiorari was pending in the Supreme Court.

Unquestionably, appellant, a United States Marshal, showed bad judgment in going to the place of business of a potential prisoner for the purpose of entering into any sort of a business deal with him. Bad judgment, however, is not synonymous with criminal purpose or intent. And even if the testimony of Church as to what appellant said on January 27, 1951, be accepted at its deepest thrust it does not measure up to proof that appellant then or theretofore conspired

with any person or persons "with the intent and purpose to defraud the United States in the exercise of its governmental powers by impairing, obstructing and interfering with the lawful functions of a Department of the United States", or attempted "unlawfully and corruptly to influence, obstruct and impede said Attorney General and the said Bureau (of Prisons) in the designation of places of confinement where sentence shall be served and transfers made from one institution to another in connection therewith of a Federal prisoner theretofore committed to the custody of said Attorney General, said Federal prisoner being one Phil Davis".

The record leaves no doubt, moreover, that however the episode of January 27, 1951, may be viewed or appraised it resulted in failure, for no automobile trade was agreed to or made and appellant bought an automobile elsewhere.

Early in February of 1951 Davis sought the advice and assistance of his good friend defendant Neider with the objective of obtaining imprisonment for Davis in a local jail with special privileges if it became necessary for Davis to serve his sentence of 6 months. In turn, *on behalf of Davis,* and with the same objective, Neider sought the advice and assistance of his good friend defendant Reynolds. RT 1058-1059.

It has already been mentioned that only the Director of Prisons, Washington, can authorize the imprisonment of a Federal prisoner in a local jail.

and that under general authorization from the Director of Prisons the imprisonment of Davis in an Alameda County jail would be lawful. Federal prisoners in such local jails are subject to the prison routine established by the local authorities, and it is contrary to the rules and regulations of the Bureau of Prisons to accord them special privileges. It is therefore obvious that before Davis could attain the objective of special privileges it would be necessary for Davis or those acting on his behalf to make clandestine and questionable arrangements therefor with the Sheriff of the county in which the local jail was located. The record here is plain that the Sheriff of Alameda County did not tolerate and would not tolerate special privileges for Federal prisoners committed to his custody.

Between this date early in February of 1951 and March 26, 1951, there were many conversations between Davis and Neider, Davis and Reynolds, Church and Neider, Church and Reynolds, and Neider and Reynolds, respecting their objective, and in some of these conversations the name of appellant was mentioned. The efforts of these other named defendants on behalf of Davis were terminated by him on March 26, 1951, and he called in the FBI on that date. The record contains no evidence of any conversation or communication between appellant and Davis or Church during that period. Nor does the record contain any evidence, direct or indirect, of any conversation or communication between appellant and Neider or Reynolds during that period. Appellant has al-

ready referred to the fact that Church's narration of conversations occurring during that period came into the record under rulings of the court limiting their application to the case against the defendant with whom Church talked. The Neider-Reynolds conversations need not be reviewed by appellant, for they reflect lawful efforts to attain by lawful means only so much of the contemplated objective as was lawful. The Davis testimony came into the record without limitation. It was later limited to some extent, however, by the ruling, accompanying the granting of the motion of defendant Neider for judgment of acquittal, whereby the Davis' testimony of Davis-Neider conversations was expunged from evidence.

There remains for consideration, therefore, only that part of the Davis testimony as to Davis-Reynolds conversations which seeks to implicate appellant as a conspirator by statements ascribed to appellant by Reynolds in his conversations with Davis. Otherwise stated, and measured by the allegations of the indictment, the Davis testimony under discussion amounted to what one coconspirator (Davis) said a second coconspirator (Reynolds) said a third coconspirator (appellant) said. Such evidence, if it may be termed such, does not amount to proof that appellant was a conspirator. *Mayola v. United States,* 9 Cir. 71 F. 2d 65. And even if the Davis testimony reflected an admission or declaration by appellant, which it does not, it could not have the legal effect of establishing the corpus delicti in a conspiracy case. *Colt v. United States,* 5 Cir. 160 F. 2d 650, 651; *Tabor v. United*

States, 4 Cir. 152 F. 2d 254, 257; *United States v. Di Orio,* 3 Cir. 150 F. 2d 938, 940; *Ryan v. United States,* 8 Cir. 99 F. 2d 864, 869.

From what has been said under this subdivision it accordingly follows that there is no substantial evidence in the record proving: (a) A continuing conspiracy from on or about January 27, 1951, up to and including April 12, 1951; (b) a conspiracy existing on or before January 27, 1951; and (c) a conspiracy to which appellant was a party on or before March 26, 1951.

On the record here it is plain that if a conspiracy existed on April 12, 1951, it was one that was formed on or after March 26, 1951, by Davis and Church acting under the direction and supervision of the FBI, and it reached out to include appellant and defendant Calmes after April 4, 1951, or it was one that was formed by appellant and defendant Calmes after the latter returned from Honolulu on April 4, 1951, and it reached out to include Davis and Church acting under the direction and supervision of the FBI.

It was the position of appellant at the trial that in the events leading up to the acceptance of $2000 from Davis (Church) on April 12, 1951, he acted from honest motives and for the purpose of bringing to justice those who were sullying it. RT 848-849, 865-866. Hindsight precludes appellant from contending that he was not guilty of inexcusable blundering and bungling. He does contend, however, that even if the events that transpired between March 26, 1951, and

April 12, 1951, be viewed, as they must be viewed, in the light most unfavorable to him, proof thereof will not suffice to convict him of the general and continuing conspiracy alleged in the indictment.

The main contention of appellant on his appeal is that there was a fatal variance between the indictment and the proof, that at most the proof established several conspiracies, and that appellant's conviction of the general conspiracy cannot be sustained by proof of that character. He invokes the principles considered and applied by the Supreme Court in *Kotteakos v. United States,* 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557, and by this court in *Canella v. United States,* 9 Cir. 157 F. 2d 470.

It is the position of appellant that the record refutes a conclusion that a conspiracy was formed or existed on or prior to January 27, 1951. This court may disagree. Should it do so, it would nevertheless be clear that such conspiracy was formed solely by appellant and defendant Calmes, and that it ended in failure on January 27, 1951, without having been joined by any of the others named in the indictment as conspirators. If a conspiracy or conspiracies existed after January 27, 1951, and up to March 26, 1951, it is nevertheless clear that such conspiracy was or such conspiracies were formed solely by those named in the indictment as conspirators other than appellant and defendant Calmes, and terminated on or before March 26, 1951, at the instance of Davis, and without being joined by appellant or defendant

Calmes. And if a conspiracy existed after March 26, 1951, and up to April 12, 1951, it is nevertheless clear that it was either formed by Davis and Church at the instance of the FBI or joined by them at the instance of the FBI and that neither defendant Neider nor defendant Reynolds ever joined it.

Thus viewed, it must inevitably follow that appellant was convicted of the general conspiracy on proof of several conspiracies. That he was substantially prejudiced thereby under the circumstances of the case is obvious. His conviction rested upon the dishonest and unlawful acts and statements of others which were not binding on appellant and for which he was not responsible. Their dishonest and unlawful statements prejudicially colored his own avowedly honest and lawful acts and statements. This case is plainly governed by the *Kotteakos* case and the *Canella* case, and the authority of those cases demands a reversal of the judgment against appellant.

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3. ERRONEOUS INSTRUCTIONS ON MATERIAL ISSUES OPERATED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT.

Specification of Error No. 2. The District Court erred in instructing the jury as follows:

"Although, as I have stated, a common design is the essence of the charge, such design may be made to appear when the defendants steadily pursue the same object, whether acting separately or together by common or different means, all leading to the same unlawful result." RT 1484/18-22.

"Mr. Burns: The only objection, if Your Honor please, for the record is in instruction No. 13 where Your Honor said, 'Although, as I have stated, a common design is the essence of the charge, such design may be made to appear when the defendants steadily pursue the same object, whether acting separately or together.' It is my understanding of the law that there has to be concerted action in a conspiracy, and as I have indicated before there could be co-existent two separate conspiracies." RT 1499/22 to 1500/5.

The state of the record would permit the jury to find that there were at least two separate conspiracies, each of which was impregnated with the common design of extorting money or its equivalent from Davis by threats of the same character, and that appellant was party to one of them but not the other. Yet the challenged instruction authorized the jury to convict appellant of the general conspiracy merely because a common design was reflected in the two conspiracies. This was error. It is not at all improbable that the error resulted in the jury convicting appellant of the general conspiracy. The error was therefore prejudicial. *Kotteakos v. United States,* 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557; *Canella v. United States,* 9 Cir. 157 F. 2d 470.

4. **THE JUDGMENT AGAINST APPELLANT SHOULD BE REVERSED FOR THE REASON THAT THE DISTRICT COURT MANIFESTLY ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR NEW TRIAL.**

Specification of Error No. 3. The District Court erred in denying appellant's motion for a new trial.

In his motion for new trial appellant specified insufficiency of evidence and error in the instructions. RT 152-153. The motion was denied and judgment and commitment followed. RT 166-167. The sufficiency of the evidence by appellant on motion for judgment of acquittal. RT 735-736. Insufficiency of the evidence to sustain a conviction is always plain error. *Lockhart v. United States,* 4 Cir. 183 F. 2d 265, 266; *United States v. Renee Ice Cream Co.,* 3 Cir. 160 F. 2d 353, 355. The denial of the motion for new trial therefore reflects a manifest abuse of discretion on the part of the District Court requiring a reversal of the judgment. *United States v. Johnson,* 327 U.S. 106, 111, 66 S.Ct. 464, 466, 90 L. Ed. 562.

Wherefore appellant respectfully submits that the judgment against him should be reversed.

Dated, San Francisco,
February 11, 1952.

JAMES E. BURNS,
Attorney for Appellant.